

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

FILED

NOV 24 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

PETITIONER,
Vs.

APPEAL NO. 09F-04589

AGENCY FOR HEALTH CARE
ADMINISTRATION (AHCA)
CIRCUIT: 18 Seminole

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned in Sanford, Florida, at 10:20 a.m. on September 22, 2009. The petitioner was present with his twin brother, _____, and the petitioner's mother, _____, represented the petitioner. Also present on behalf of the petitioner was _____ LPN with Maxim. Lissette Knott, human service program specialist, represented the respondent. Present to testify on behalf of the respondent were Robert Anthony Buzzeo, MD, physician reviewer with KePRO and Melanie Clyatt, RN, nurse reviewer with KePRO.

ISSUE

At issue was whether reduction in Private Duty Nursing (PDN) hours was correct. The respondent bears the burden of proof.

FINDINGS OF FACT

1. At the time of the review, the petitioner was a two-year old child (DOB) receiving twenty-four hour daily PDN services under state plan Medicaid. His situation is medically complex and that is undisputed. His need for home health care is undisputed, but the number of approved PDN hours is disputed.

2. On July 6, 2009, the respondent issued notice that 912 PDN hours were denied for the new certification period of May 17 – November 12, 2009. The respondent denied the hours between 8:00 p.m. and 11:00 p.m. daily, or 912 hours. Previously, all 4320 hours were approved for 24 hours coverage. The petitioner's mother challenged that reduction.

3. The petitioner's mother is trained for and capable of providing his care. The father also knows how to care for the petitioner. The mother does not work outside the home, but she also has two other young children and needs to attend to many other family responsibilities including shopping, home care, basic needs of other household members, medical care, etc.

4. The father works six days a week, sometimes travels for work unexpectedly, and is sometimes gone overnight. Customarily he arrives home about 6:00 p.m., goes to bed around 8:30 or 9:00, and is up at 4:00 a.m. to prepare for work. Additionally, the father attends Cub Scout activities on Tuesday and Thursday evenings.

5. The petitioner's mother is concerned that the father will not be available to provide emergency or complex assistance she might require in those evening

hours. While acknowledging her training and capability, she is concerned about being the sole care provider. She notes the petitioner was discharged from the hospital at the end of June 2009. She notes his situation is not only fragile; it is unstable and worsening. According to case synopsis, he was hospitalized for a period during each month (except possibly December 2008), between October 2008 and June 2009.

6. The family was late for the hearing. They were late because the petitioner pulled out his tracheostomy tube. This is just one example of ongoing problems. The petitioner's survival depends on technical equipment, medical devices, supplies, and personal care. He is totally dependent, including for food, all hygiene, and oxygen, and is nonverbal. Petitioner's Exhibit 1 confirmed severe medical problems and showed the doctor recommended around the clock nursing. KePRO staff were fully aware of the doctor's recommendation.

CONCLUSIONS OF LAW

By agreement between the Agency for Health Care Administration (AHCA) and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearing to conduct this hearing pursuant to Florida Statute, Chapter 120.80.

Florida Statute 409.905 addresses **Mandatory Medicaid services** with section (4) informing that HOME HEALTH CARE SERVICES can be covered. Subsection (b) informs:

The agency shall implement a comprehensive utilization management program that requires prior authorization of all private duty nursing services.... The utilization management program

shall also include a process for periodically reviewing the ongoing use of private duty nursing services. The assessment of need shall be based on a child's condition, family support and care supplements, a family's ability to provide care, and a family's and child's schedule regarding work, school, sleep, and care for other family dependents...

It is concluded that AHCA must review continued need for private duty nursing (PDN) service.

Florida Statute 409.913 addresses **Oversight of the integrity of the Medicaid program**, with (1)(d) describing "medical necessity or medically necessary" standards. Consistent with statute, Florida Administrative Code 59G-1.010 (166) defines "medically necessary," informing that such services must:

(a) Meet the following conditions:

1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and
5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker or the provider. ...

(c) The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

Florida Statute 409.913 continues, as follows:

(5) A Medicaid provider is subject to having goods and services that are paid for by the Medicaid program reviewed by an appropriate peer-review organization designated by the agency. The written findings of the applicable peer-review organization are admissible

in any court or administrative proceeding as evidence of medical necessity or the lack thereof.

The petitioner's medical situation is undeniably complex. He needs constant attention, care, and supervision in all aspects of living. He needs the equivalent of around the clock nursing care. However, this does not automatically mean that PDN for 24 hours a day is mandatory. The Florida Administrative Code 59G-4.130(2) requires compliance with the Home Health Services Coverage and Limitations Handbook. That Handbook has at least three relevant and controlling sections, addressing **Parental Responsibility, Flex Hours or Banking of Hours** and **Authorization Process.**" At pages 2-15 and 2-19, sequentially, these sections say:

Private duty nursing services are authorized to *supplement* (emphasis added) care provided by parents and caregivers. Parents and caregivers must participate in providing care to the fullest extent possible. Training can be offered to parents and caregivers to enable them to provide care they can safely render. Medicaid does not reimburse private duty nursing services provided solely for the convenience of the child, the parents or the caregiver. Medicaid does not reimburse private duty nursing for respite care. Examples are parent or caregiver recreation, socialization, and volunteer activities.

...

Medicaid does not allow "banking of hours" or "flex hours". Only the number of hours that are medically necessary may be approved. Home health service providers must request only the number hours that are expected to be used and must indicate the times of day and days per week that the hours are needed. If a recipient requires additional hours due to unforeseen circumstances or change in medical or social circumstances, the home health service providers should submit a modification request to the PRO for the additional hours needed.

...

Private duty nursing services are authorized by the Medicaid peer review organization if the services are determined to be medically necessary.

The mother's concern is clear and understandable due to the fragile nature of the petitioner's conditions. It is understandable that she would prefer not to be alone in an emergency. However, it is concluded that statute and regulation support the determination of the state agency.

The petitioner's mother is fully trained and capable of providing care for him. She affirmed such and acknowledged the father also knew how to provide care. The regulatory requirement is that PDN is a supplement to care, not the primary source of care. The mother is in the home during the hours under concern. The father would generally be present at those hours. He would be supportive in an emergency, or to provide care, as well. Parental care should be available for the three hours per day at issue, between 8:00 and 11:00 p.m. The PDN should be available at all other time as a supplement for parental care.

If the petitioner requires additional hours due to unforeseen changes, then the home healthy service provider would submit a request for modification to the peer review organization. That is permissible and is the standard business practice of the agency. In final analysis, the respondent's action was justified.

DECISION

The appeal is denied and the respondent's action is affirmed.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices

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must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The agency has no funds to assist in this review, and any financial obligations incurred will be the petitioner's responsibility.

DONE and ORDERED this 24th day of November 2009, in

Tallahassee, Florida.



J.W. Alper
Hearing Officer
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